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THE AMERICAN LAW REGISTER.

JANUARY 1883.

AUCTION SALES.

THE auction-sale—from *augeo*, to gradually increase—is, as its name imports, of Latin origin, having been introduced by the Romans, to dispose of spoils or captives taken in war. Such sales took place on the open field, or before the victor's tent; a spear being erected in the ground to which was attached a red streamer to attract purchasers; whence perhaps comes our present custom of the red flag at every auction door. To be sold under the spear, *sub hasta*, was therefore to be sold to the highest bidder at or by public auction.

The usual method of the auction sale is, of course, to commence with the lowest bidder and gradually advance to the highest, but in Holland the mode of sale, called Dutch Auctions, is in the reverse order; the article being offered at the highest price stated, and a purchaser called for at that sum, the price being gradually lowered until a purchaser is found. These are called auctions, although "Sales by Decretion" would more exactly describe them. Dutch auctions are sometimes resorted to in this country, an instance of which may be found in *Village of Deposit v. Pitts*, 18 Hun 475.

Some difference of opinion exists whether such sales should be called "sales *at* auction or "sales *by* auction;" but whichever be the more correct, the phrase "auction sales" would apparently suffice. Let us trace the progress of this sale and see when and

how various liabilities arise under it, and the nature and consequences thereof.

The owner of goods sends his property to an auction store. This act alone *prima facie* gives the auctioneer authority to sell them by auction. As selling is his business and his only business, he has a right to infer, in the absence of other instructions, that the owner sends them to him for this purpose.

And by the English law goods sent to a public auction room for sale, are, while there, exempt for distress for rent due from the auctioneer: *Adams v. Grane*, 1 Cr. & M. 380, 3 Tyrw. 326; *Brown v. Arundell*, 10 C. B. 54; *Williams v. Holmes*, 8 Exch. 861.

The owner may when sending his goods to an auctioneer stipulate that they shall not be sold below a certain sum, and if the auctioneer disregards these instructions and sells for a less price, he is liable to the owner, like any other agent, for disobeying his principal's directions: *Steele v. Ellmaker*, 11 S. & R. 86; *Wolfe v. Luyster*, 1 Hall 146; *Hazul v. Dunham*, Id. 655; *Wilkinson v. Campbell*, 1 Bay 169.

And in such case the only safe way would seem to be, for the auctioneer not to start the sale unless the minimum price is first offered; for according to Lord MANSFIELD's opinion in the leading case of *Bexwell v. Christie*, Cowper 395 (1776), if the goods are once set up the auctioneer is bound to sell to the highest bidder, whether the required price is reached or not; and therefore he is not liable to the owner for selling at a less amount.

It has been said that the auctioneer's authority to sell may be revoked at any time before sale, even after the bidding has commenced; and that subsequent purchasers are bound by such revocation: *Manser v. Back*, 6 Hare 443; and in *Corryolles v. Mossy*, 2 La. 504, it was held that the owner may withdraw the property, even after the sale has commenced, if the bid had not been accepted, and the article struck off, though the Louisiana Code may have influenced the decision. On the other hand if the owner of goods leaves them in the possession of the auctioneer and gives no notice of the revocation of his authority, a subsequent sale to a bona fide bidder would be valid. See *Gunn v. Gillespie*, 2 U. C. Q. B. 124. And there are still stronger reasons, as we shall see, why after the auction has once commenced the owner has no right to countermand the sale, and forbid the auctioneer to strike off the goods, or withdraw them from the sale.

But however that may be, it is clear that in other respects the auctioneer is bound to obey his instructions, and if directed to sell at auction he has no right to sell at private sale; and whether the buyer in such case could or could not lawfully claim the goods, the auctioneer is liable to his principal for this breach of duty: *Marsh v. Jelf*, 3 F. & F. 234; and see *McMechen v. Mayor*, 3 Har. & J. 534.

And conversely if authorized only to sell at private sale, he has no right to sell by auction; and if he does so, the purchaser cannot hold the property, if the circumstances are such as to "put him on inquiry": *Towle v. Leavitt*, 23 N. H. 361.

But to proceed. The auctioneer duly advertises the goods for sale at a day named. Persons attend at the time and place. The goods are then withdrawn, and no sale takes place. Have the would-be buyers any claim on the auctioneer for their loss of time and expenses in attending, relying upon the unconditional announcement that the sale would actually take place? Is there any contract or implied warranty on the part of the auctioneer that the goods shall be put up? It seems not. The advertisement of an auction sale is not exactly an offer of the goods to the highest bidder, but rather a declaration of an intention to offer them—an offer to offer—and consequently it was recently held there is no liability on the part of the auctioneer to those who attend the expected sale, for their time and expenses, the advertisement having been made in good faith: *Harris v. Nickerson*, L. R., 8 Q. B. 286 (1873); and *Spencer v. Harding*, L. R., 5 C. P. 561, so far as it goes, is in the same direction. It might be different if false and fraudulent representations had been made; for in the very same year, the same court decided that if a person knowing he did not own certain property, and therefore could not sell or lease it, should fraudulently advertise it for sale or lease, and others were thereby induced to expend time and money in examining the property, procuring appraisements, &c., for the purpose of buying or leasing, such pretended owner would be liable in tort for the deceit, for the expenses so incurred: *Richardson v. Silvester*, L. R., 9 Q. B. 34. And see BLACKBURN, J., in *Mainprice v. Westley*, 6 Best & Sm. 427.

But if the property be once actually put up, and bids are given and received, under an advertisement or statement that the sale is to be "without reserve," or that it "will be sold to the highest bid-

der," it seems that the highest bona fide responsible bidder is entitled to it; and that either the owner or the auctioneer is liable in some form of action, if he refuses to strike it off to such bidder. Doubtless the auctioneer may, for the purpose of securing sufficient bids, and preventing a sacrifice, reasonably adjourn the sale to some other day, and await future offers. This power is reasonable for the protection of the owner, and is a well settled right in auction sales: *Richards v. Holmes*, 18 How. 143; *Hosmer v. Sargent*, 8 Allen 97; *Dexter v. Shepard*, 117 Mass. 480; *Russell v. Richards*, 11 Me. 371; *Tinkom v. Purdy*, 5 Johns. 345.

But if after waiting a reasonable time no higher bidder appears, the last and highest bidder certainly seems to have a just claim to the property. It is sometimes said—nay, very often said—that the auctioneer is not bound unless he actually strikes off the property; and that as the buyer may retract his bid at any time before the hammer comes down, so, until that event the auctioneer may retract his offer, and refuse to strike it off; for the alleged reason that one party is never bound unless the other is; and *Payne v. Cave*, 3 T. R. 148, is relied upon for this principle; re-asserted in *Blossom v. Railroad Co*, 3 Wall. 206, and many other places.

But if that is ever true, can it be so when the sale is expressly advertised to be "without reserve," or that the property "will be sold to the highest bidder?" It seems that such a proposal is a standing offer to sell to whoever shall finally become the highest bidder; and therefore that the auctioneer becomes bound by such offer the moment a person so far accepts it as to bid, and proves to be in fact the highest bidder. Such an advertisement excludes any interference by the vendor or auctioneer, direct or indirect, which can under any possible circumstances affect the right of the highest bidder to be declared the purchaser.

It may be the sale is not an entirely *complete* sale, so as to vest the present title in the thing sold, until the hammer comes down. But if that be so, and if the bidder could not maintain replevin for the identical chattel, does it follow he might not have some form of action for breach of the auctioneer's implied agreement and obligation to strike off the property to the highest bidder as he had advertised and promised to do; a breach of an executory contract *to sell* if not a contract *of sale*. This is a familiar distinction in private sales. A private purchaser has an action against a private seller who refuses to deliver and complete his

executory contract to sell, although he has no complete title to the specific thing, but only damages for not having it. Why not in the auction or public sale? If not, an auction sale is but a farce?

But it may be asked what binds the auctioneer to let the highest bidder have the goods? What is the consideration for such a contract or promise on his part? Evidently the promise of the bidder to take the goods and pay for them the sum. A promise to buy is always a good consideration for a promise to sell. But it may be said the promise of the buyer is voidable, that he may retract his bid at any moment before the hammer comes down, and *Payne v. Cave* certainly so holds. So does *Fisher v. Seltzer*, 23 Penn. St. 308. Be it so. Still a voidable promise is always sufficient to support one on the other side not voidable. An infant's promise to buy things not necessities, though voidable, will support an adult's promise to sell them to him. One is bound, the other may retract. So of a promise voidable for duress, fraud, or because only oral under the Statute of Frauds. It is not universally true, as so often asserted, that neither party is bound unless both are. In all cases of unilateral contracts the reverse is true. The auction sale is quite analogous to other public offers, as for rewards, &c. Why is the person offering a reward for lost property or information bound to pay the moment the thing is done by any one? A. says, "I will pay \$100 to any one who will return my lost dog." B. returns him. That closes the contract. A. might have retracted before, and if in an equal public manner as his offer, he might not be liable for a subsequent return. So the auctioneer promises to sell and deliver the goods to whoever will bid the most for them. A. bids the most, he does exactly what the auctioneer asked for, and fulfils the exact condition of his offer. Why should not the promise to sell and deliver from that moment become binding? The auctioneer may retract his offer to sell and withdraw the goods *before any body has bid*, for up to that moment no one has become the highest bidder. Up to that moment no one has brought back the lost dog.

But after such bid is made, it is too late; the dog is returned. The only difference between the two cases is that it may not be known at the moment of a bid by Mr. A., that he is the highest bidder, as Mr. B. may bid more; but if in due time no one *does* bid more, then it is proved that Mr. A. is the highest bidder, and, if he has not retracted in the meantime, he is in law still repeating and

continuing his offer every moment of time while the auctioneer is crying for more bids. Consequently his rights are just the same as though the auctioneer had offered the article at a fixed price, and A. instantly said, "I'll take it at that price." In *Warlow v. Harrison*, 1 El. & El. 316; 29 L. J. Q. B. 14; MARTIN, B., says, "In a sale by auction there are three parties, viz.: the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid, which of course includes the highest bidder. In this, as in most cases of sales by auction, the owner's name was not disclosed; he was a concealed principal. The name of the auctioneers, of whom the defendant was one, alone was published; and the sale was announced by them to be without reserve. This, according to all the cases, both at law and equity, means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not: *Thornett v. Haines*, 15 M. & W. 367. We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward, or that of a railway company publishing a time table stating the times when, and the places to which the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him: *Denton v. Great Northern Railway Co.*, 5 E. & B. 860. Upon the same principle it seems to us that the highest *bona fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think the auctioneer who puts the property up for sale upon such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so, and that this contract is made with the highest *bona fide* bidder; and, in case of a breach of it, that he has a right of action against the auctioneer."

For his protection therefore the auctioneer, being liable after he has once taken and accepted a bid, may refuse to recognise and take the bid of irresponsible parties, such as minors, insolvents, &c.: *Kinney v. Showdy*, 1 Hill 544; *Den v. Zellers*, 7 N. J. L. 185; *Gray v. Veirs*, 33 Md. 18; *Holder v. Jackson*, 11 U. C. C. P. 543.

But if he once accepts and adopts a bid, announces it as a valid bid, calls for more bids upon the strength of it, then his liability commences if no one bids more. By "taking" a person's bid, he

does accept it, conditionally to be sure, but on a condition which *he* cannot control—that of a higher bid. It is the acceptance of the bid in this sense, and not the fall of the hammer, as said to have been asserted in *Payne v. Cave*, which fixes the auctioneer's liability. Indeed, nothing *decided* in that case militates with this view. It was an action by the vendor against the buyer, to recover 10*l.*, the difference between his bid, and a second sale made because of his refusal to take under the first bid. And it distinctly appeared in the evidence that after the defendant had bid 40*l.*, and while the auctioneer was dwelling on the bidding, the defendant distinctly retracted and told the auctioneer he would not take it; but nevertheless the auctioneer struck it off to him at 40*l.* Lord KENYON nonsuited the vendor, and the whole opinion as reported is: "The court thought the nonsuit very proper. The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is, signified on the part of the seller by knocking down the hammer, which was not done here until the defendant had retracted. An auction is not inaptly called *locus pœnitentiæ*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But, according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed. Rule refused." Thus it will be seen the only point necessary to the decision was that the *bidder* might retract before the hammer came down, though the *dicta* and reasoning go somewhat further.

The case of *Mainprice v. Westley*, 6 Best & Smith 420, is sometimes cited in support of the same view; but everything actually decided was that in that particular sale, owing to the form of the advertisement, and the explicit reference to the principal and owner of the property, the auctioneer was not *personally* liable to the highest bidder for not striking off the property to him; but the judges, especially BLACKBURN, seem to admit that in ordinary cases, where the auctioneer does not disclose his principal, he may be personally liable in damages, if he withdraws the property from the sale, there being an implied warranty on his part that he would sell to the highest bidder. And in the subsequent case of *Harris v. Nickerson*, L. R., 8 Q. B. 289, QUAIN, J., says: "When a sale is advertised as without reserve, and a lot is put up and bid for, there is ground for saying, as was

said, in *Warlow v. Harrison*, that a contract is entered into between the auctioneer and the highest *bona fide* bidder," and BLACKBURN, J., uses similar language on p. 288.

Such was certainly the opinion of Lord MANSFIELD in *Bexwell v. Christie*, Cowper 395.

But whatever may be the rights and remedies of the highest bidder against either the owner or the auctioneer, before the hammer comes down, it is clear that upon that event, the sale is complete; the title to the goods immediately passes to the buyer, and with it the risk of ownership, without any delivery or other formality at common law, though *possession* may be retained by the auctioneer until paid for. So although the goods are in the custom house subject to duties before delivery: *Simon v. Metiver*, 1 Wm. Bl. 601, where Lord MANSFIELD says, "I remember a case where some sugars were bought, and afterwards consumed by fire in the auction warehouse, and the loss fell on the buyer. See also *Hinde v. Whitehouse*, 7 East 558, where the goods were sold on the 20th September, but remained on the premises where the sale took place until the 22d, when they were destroyed by an accidental fire. And this case was distinctly approved in *Sweeting v. Turner*, L. R., 7 Q. B. 313, although there was, in both cases, an express stipulation that at the fall of the hammer the property should pass to the buyer.

STATUTE OF FRAUDS.—If, however, the price bid be over \$50 in amount (if necessary, otherwise not), the Statute of Frauds applies, and some other formalities are necessary to render the contract binding on either party; for it is now well settled, notwithstanding the opinion of Lord MANSFIELD and other judges to the contrary, in *Simon v. Metiver*, 1 W. Bl. 599, that public auction sales are within the statute, as much as private sales. This is the universal rule in England and this country: *Kenworthy v. Schofield*, 4 D. & R. 556; 2 B. & C. 945; *Walker v. Constable*, 1 B. & P. 306; *Peirce v. Corf*, L. R., 9 Q. B. 210; *Davis v. Rowell*, 2 Pick. 64; *Morton v. Dean*, 13 Met. 385; *Horton v. McCarty*, 53 Me. 394; *Brent v. Green*, 6 Leigh 16; *Burke v. Haley*, 7 Ill. 614; *Hicks v. Whitmore*, 12 Wend. 548.

And, if no memorandum be made, the *auctioneer* or vendor may repudiate the bargain as well as the buyer, and in that case may immediately resell the goods for a higher price to any other parties: *Pike v. Balch*, 38 Me. 302.

It is the right and duty of the auctioneer, therefore, upon striking off such goods, to call for the name of the buyer, if unknown, in order that he may make the memorandum required by the statute; and a neglect to make such memorandum is a breach of his official duty, rendering him liable to his employer if thereby the sale proves abortive: *Townsend v. Van Tassel*, 8 Daly 261; *Peirce v. Corf*, L. R. 9 Q. B. 210.

In *Hicks v. Minturn*, 19 Wend. 550, it was held that negligence was the gist of his liability in such cases, and as the statute expressly requiring him to make such memorandum, was new, and of doubtful construction, the omission was held not conclusive proof of negligence.

The auctioneer, as is universally conceded, is the authorized agent of his employer, the vendor, to make this memorandum, so as to bind his principal; but as to his authority to bind the *buyer*, more confusion exists. It is commonly stated that an auctioneer is agent for both parties to make a memorandum under the Statute of Frauds; as though he was equally, and under all circumstances, the agent of the one as well as the other; but it is conceived that this is not so; that his authority to bind the vendor arises from his being employed by him to sell, and of course to make a valid and binding sale, and therefore to do all acts necessary to make the sale valid and binding on his principal. Whereas he is not generally agent for the bidder to buy. He is acting adversely to him throughout the sale, and has no authority *virtute officii*, to bind him. His agency or authority, therefore, must rest on some express direction or request from the buyer, or his tacit assent and approval that such memorandum may be made; as by standing by and seeing it done without objection; or by the existence of a general custom and usage to that effect, of which the buyer must be presumed to be aware. And therefore while he may bind the vendor by a memorandum made at any time, either before, during, or after the sale, and without regard to the vendor's presence or absence, knowledge or ignorance, yet it is clear he cannot so bind the purchaser, after the sale is entirely over and the latter has departed without in any way assenting to such action by the auctioneer. See *Horton v. McCarty*, 53 Me. 394; *Walker v. Herring*, 21 Gratt. 678; *Smith v. Arnold*, 5 Mason 418, STORY, J.; *Mews v. Carr*, 1 H. & N. 488; *Bamber v. Savage*, 12 Rep. 96; *Flintoft v. Elmore*, 18 U. C. C. P. 274. And see Sugden on Vendors (14th

ed.) p. 147; *Gill v. Bicknell*, 2 Cush. 355, SHAW, C. J.; *Entz v. Mills*, 1 McMullan 453.

An auctioneer, therefore, has no more authority, *virtute officii*, to bind the purchaser by his memorandum than any other agent of the vendor has; and that may be the reason why an auctioneer who is also the owner selling his own goods is not created such agent by any indirection or implication: *Smith v. Arnold*, 5 Mason 414; *Bent v. Cobb*, 9 Gray 397; *Tull v. David*, 45 Mo. 444; *Adams v. Scales*, 1 Baxt. (57 Tenn.) 338.

So where there were written conditions of sale, one of which was that the purchaser should pay for the goods upon delivery, and in which at the time the auctioneer in the usual manner wrote down the name of the purchaser, in an action by the real owner for the price bid, the purchaser was allowed to show by parol an oral agreement between himself and the plaintiff, the owner, made before the day of sale, that the purchase-money should be set off against a debt due from the plaintiff to the purchaser, notwithstanding the objection made, that such testimony went to vary the written contract of sale; and it was held that the auctioneer was not the agent of the purchaser to bind him by any memorandum to pay for them in cash: *Bartlett v. Purnell*, 4 Ad. & El. 792; 6 Nev. & Mann. 299; 2 Harr. & Wall. 16.

Indeed some English cases seem to hold that a vendor *cannot*, under any circumstances, be agent for the buyer to bind him by a memorandum under the Statute of Frauds: *Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmons*, 5 B. & Ald. 333; *Rayner v. Linthorne*, 2 C. & P. 124; *Sharman v. Brandt*, L. R. 6 Q. B. 720. But possibly no more is meant by those cases than that he could not be such agent without clear evidence of an *express* request or authority by the buyer so to act.

But whenever he has authority this entry or memorandum may be made, in the presence of all parties, by the auctioneer's clerk, as well as by the auctioneer himself: *Bird v. Boulter*, 4 B. & Ad. 443; *Alna v. Plummer*, 4 Greenl. 258; *Hart v. Woods*, 7 Blackf. 568; *Cathcart v. Keirnaghan*, 5 Strob. 129; *Clarkson v. Noble*, 2 U. C. Q. B. 361; *Price v. Durin*, 56 Barb. 647.

This memorandum must be full and complete of itself, and state all the material terms and conditions of the sale, such as a sufficient description of the property, names of buyer and seller, prices, credit if any, &c., &c., or it is fatally defective, and the sale is not

enforceable. The printed conditions of the sale not referred to in the memorandum, cannot be resorted to for the purpose of supplying the defect: *Rishton v. Whatmore*, 8 Ch. Div. 467; *Morton v. Dean*, 13 Met. 385; *Horton v. McCarty*, 53 Me. 394; *Peirce v. Corf*, L. R., 9 Q. B. 210; *Johnson v. Buck*, 35 N. J. L. 339; *Bamber v. Savage*, 12 Reporter 95; *Ridgway v. Ingram*, 50 Ind. 145.

The memorandum has been held necessary wherever all the articles bought by the same purchaser, at the same auction, and belonging to the same owner, amount in the aggregate to over \$50, although no one article equals that amount; and on the ground that such a sale is one entire, single sale, and not several distinct and separate sales of each and every article; even though some interval of time may elapse between each transaction or bid: *Jenness v. Wendell*, 51 N. H. 63; *Allard v. Greasert*, 61 N. Y. 1; *Coffman v. Hampton*, 2 W. & S. 377; *Tompkins v. Haas*, 2 Penn. St. 74; *Gilman v. Hill*, 36 N. H. 311.

And for a like reason an acceptance and receipt of one of such articles has been held to bind the buyer to the whole purchase, made by different bids: *Hinde v. Whitehouse*, 7 East 558; *Mills v. Hunt*, 17 Wend. 333; 20 Id. 431; *Baldehy v. Parker*, 3 D. & Ry. 220; 2 B. & C. 37; *Bigg v. Whisking*, 14 C. B. 195.

But this entirety of contract may be much a matter of intention in each individual case, and there are good grounds for holding that separate negotiations, at separate prices, where the several parcels have no necessary or supposed connection with each other, do not always form a single entire contract, though made on the same day, and between the same parties. This is especially true probably in sales of lands. See *Emmerson v. Heelis*, 2 Taunt. 38; *Van Eps v. Mayor, &c.. of Schenectady*, 12 Johns. 436; *Mott v. Mott*, 68 N. Y. 246; *Roots v. Dormer*, 4 B. & Ad. 77; *Wells v. Day*, 124 Mass. 38.

EFFECT OF MISTAKE.—Most of the general principles of the law of sales, apply to auction sales; and some of them have peculiar force and importance in such transactions. Thus from the nature of the case mistakes are more likely to occur at auctions than at private sales, and therefore it is well established that if the bidder acts under an honest mistake of fact as to the thing to be sold, he is not bound by his bid. Thus where in an auction sale of various articles by a printed and numbered catalogue, the

lot No. 24 was being sold, and a party bid, supposing lot No. 25 was up, it was held he was not bound by his offer; and that from the mistake there was no sale of either parcel: *Sheldon v. Capron*, 3 R. I. 171. And see *Megaw v. Molloy*, 2 Law Rep. (Ir.) 530 (1878), a very important case involving this principle.

Certainly courts of equity do not enforce against the buyer, a contract made under a bona fide mistake of fact as to the lot put up for sale: *Malins v. Freeman*, 2 Keen 25.

EFFECT OF ORAL DECLARATIONS.—After a sale by auction, the contract is sometimes reduced to writing, and the terms and conditions of sale, inserted therein, and duly signed by both parties. This is more usual in sales of real estate; and in such cases, the written contract forms the sole evidence of the bargain, and in the absence of fraud its terms cannot be varied, in favor of either party, by proof of oral declarations by the auctioneer at the sale, inconsistent therewith. The vendor is bound to convey according to the terms of the writing, and the buyer can demand no more, whatever might have been announced at the sale, of a different import. Such declarations are merged in the subsequent written agreement. See *Powell v. Edmunds*, 12 East 6; *Shelton v. Levins*, 2 Cr. & J. 411; *Bradshaw v. Bennett*, 5 C. & P. 48; *Mead v. Hendry*, 1 U. C. Q. B. 238. Therefore where an estate was offered at auction, described in the printed conditions as “free from encumbrance,” and the defendant bought under those terms, the fact that the auctioneer orally stated at the sale that they were encumbered, was not allowed to modify the printed statement: *Gunes v. Erhart*, 1 H. Bl. 290. It does not appear in this case that the buyer was present when the oral declaration was made, but the decision does not seem to have been placed on that special ground.

But although the sale takes place under printed conditions, and terms posted up in the auction room, yet if these are not incorporated into a regular written contract, signed by the parties, but rest only as matters of description, they may be controlled by oral declarations made before the sale by the auctioneer in the presence and hearing of the defendant who bought. Thus, where at an auction of some articles of plate, described in the advertisement as being made “of silver,” but the auctioneer stated publicly in the defendant’s presence, before the bidding commenced, that it had been discovered that they were “only plated,” the defendant was held bound to pay the price he subsequently bid, notwithstanding

the printed description was not formally erased: *Eden v. Blake*, 13 M. & W. 614. See also, *Satterfield v. Smith*, 11 Ired. 60; *Manser v. Back*, 6 Hare 443.

EFFECT OF FRAUD.—The cardinal principle of all auction sales is that they shall be entirely free, open, unbiased and unprejudiced. Neither party can resort to any stratagem, artifice, or device to secretly increase or depress the bidding. The seller must not (unless the right is expressly and publicly reserved) employ by-bidders to enhance the price; and if he does, a subsequent *bona fide* bidder may, upon discovering the fact, refuse to take the property, or if he has paid the money, before hearing of the fraud, may recover it back. Such by-bidders are called “white bonnets” in Scotland; elsewhere sometimes named “barkers.”

No doubt the owner may publicly reserve a right to bid when he offers the property, and in such case, if he does not exceed his reserved right, a sale to a subsequent bidder is binding: *Dimmock v. Hallett*, L. R., 2 Ch. App. 21. This reserved right to bid is generally understood to allow *only one* bid, and in such cases, a series of biddings, or any other excess of his right, would render voidable a subsequent sale to an innocent party: *Mortimer v. Bell*, 1 Ch. App. 10; *Gilliat v. Gilliat*, L. R., 9 Eq. 59; *Parfitt v. Jepson*, 46 L. J. C. P. 529, a valuable case not in the “regular” reports.

But unless some such right is publicly reserved, or in other words if the property is advertised to be sold “without reserve,” or to the “highest bidder,” the employment of a by-bidder, unknown to the purchaser, excuses him from fulfilling his contract: *Bexwell v. Christie*, Cowp. 395; *Howard v. Castle*, 6 T. R. 642; *Crowder v. Austin*, 11 Moore 283, and 3 Bing. 368; *Wheeler v. Collier*, Moody & Malkin 123; *Rex v. Marsh*, 3 Y. & J. 331; *Thornett v. Haines*, 15 M. & W. 367; *Green v. Baverstock*, 14 C. B. (N. S.) 204.

Such was formerly the well-established rule in equity also: *Meadows v. Tanner*, 5 Madd. 34; *Robinson v. Wall*, 2 Ph. 372.

And the American courts have generally adopted the rule, both at law and equity: *Pennock's Appeal*, 14 Penn. St. 446; *Staines v. Shore*, 16 Id. 200; *Towle v. Leavitt*, 23 N. H. 360; *National Bank v. Sprague*, 20 N. J. Eq. 159; *Veazie v. Williams*, 8 How. 134. So under the civil code of Louisiana: *Corryolles v. Mossy*, 2 La. 504; *Baham v. Bach*, 13 Id. 287.

Such secret by-bidding will avoid the sale to a bona fide bidder,

even though it was procured by the *auctioneer*, and without the real owner's knowledge: he cannot take advantage of his agent's fraud: *Veazie v. Williams*, 8 How. 134, where the auctioneer himself advanced the bidding from \$20,000 to \$40,000, before it was struck off to a real bidder, and the principal was compelled to refund the excess of \$20,000; *Curtis v. Aspinwall*, 114 Mass. 187; *Baham v. Bach*, 13 La. 287. In *Curtis v. Aspinwall*, this rule was applied although the by-bidding did not take place on the identical lot in controversy, but on lots sold previously at the same sale; the different lots being parcels of one larger tract, the sale of which would naturally affect the price of subsequent sales.

This stratagem of employing by-bidders is so odious to the law, that the by-bidder, it is said, cannot recover compensation for his services in the fraud. And for a similar reason, if the property is in fact struck off to him, the owner cannot avoid the sale, and take advantage of his own fraud: *Troughton v. Johnston*, 2 Hayw. 328.

Strange to say, courts of equity, at one time, recognised the right of a vendor to make one bid, if it was done merely to prevent a sacrifice of the property below its real value, and not to unduly enhance it. See *Bramley v. Alt*, 3 Ves. 620 (1798); *Smith v. Clarke*, 12 Id. 481; *Flint v. Woodin*, 9 Hare 618; *Woodward v. Miller*, 2 Col. C. C. 279. Sometimes adopted in this country: *Veazie v. Williams*, 3 Story 623; *Reynolds v. Dechaums*, 24 Tex. 174.

But such a doctrine could only have one result. No by-bidder ever would afterwards be employed to "puff the sale," but only to "prevent a sacrifice!" Every bidder has a perfect right to buy at an undervaluation if he honestly can: *Staines v. Shore*, 16 Penn. St. 200. The rule itself was so dangerous, that after a long conflict in this respect between courts of law and courts of equity, in which the former most certainly applied the higher principles of equity, Parliament interfered and by Statute 30 and 31 Vict., c. 48 (1867), declared that whenever "a sale by auction of land would be invalid *at law* by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law, and also providing that the particulars or conditions of such sales should expressly state whether the land is to be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; and if it is stated that the land will be sold without reserve, or to

that effect, it shall not be lawful for the owner to employ any person to bid at such sale, or for the auctioneer to knowingly take any bidding from any such person."

But this statute applies only to *land* sales, and leaves the law still unsettled as to sales of goods and chattels.

It is also a fraud on the buyer to misrepresent as to material facts about the property to be sold; as to advertise it as having belonged to some well-known gentleman (who is understood to have been a good judge of such property), and "sold by order of his executors," &c., or other similar misrepresentations. Such fraud vitiates the sale: Lord MANSFIELD in *Bexwell v. Christie*, Cowper 397; *Rex v. Kenrick*, 5 Q. B. 49.

Therefore if the goods advertised for sale are described as the property of "A. deceased," and some of the goods of B. are mingled with them. and sold as A.'s, the buyer is not bound to take them, upon learning the facts: *Thomas v. Kerr*, 3 Bush 619.

But in order to avoid a sale for any fraud, the buyer should repudiate promptly, upon discovering the facts, or he may waive and lose his rights to rescind the sale: *Backenstoss v. Stahler*, 33 Penn. St. 251; *McDowell v. Simms*, 6 Ired. Eq. 278; *Tomlinson v. Savage*, Id. 430; *McDowell v. Simms*, Busbee Eq. 130. If the fraud is not discovered until it is too late to return the property, he may defend in an action for the price; *Staines v. Shore*, 16 Penn. St. 200.

So much for the vendor's frauds. Now as to the buyer's.

In like manner the buyer must not resort to stratagem, or undue influence to depress the price, or "chill the sale," as it is termed. Thus at an auction sale of a barge, one bidder told the bystanders that the owner had not used him well, that he still owed him for building the barge, and he wanted to buy it to make himself whole. Therefore they refrained from bidding, and the barge, though worth 150*l.*, was struck off to him for 50*l.* The auctioneer, on discovering the facts, refused to deliver the barge, and sold it again for over 100*l.*; and the first buyer brought suit for the property, but it was held he was not entitled to it: *Fuller v. Abrahams*, 6 Moore 316; 3 Br. & Bing. 116.

So where land was being sold for taxes, and one bystander told the other "it was no use to bid on that land, for the owner would certainly redeem it in a short time," and thus deterred others from

bidding, and bought it himself, it was held the sale was void for this unfair influence : *Slater v. Maxwell*, 6 Wall. 268.

So, if a bidder gives the bystanders to understand he is bidding for the absent owner (as where his property is being sold adversely to him on execution), and thus induces others not to bid, out of sympathy or regard for such owner, the bidder cannot claim the property struck off to him at a low price by reason of this fraud : *Cocks v. Izard*, 7 Wall. 559. And see *McDonald v. May*, 1 Rich. Eq. 91; *Kinard v. Hiers*, 3 Id. 423; *Schmidt v. Gatewood*, 2 Id. 162; *Johnston v. La Motte*, 6 Id. 347.

So if a bidder makes fraudulent statements as to the existence of mortgages on the property, for the purpose of deterring bidders, and thus obtains the property at less than its fair value, the sale may be set aside for the fraud : *Jackson v. Morter*, 82 Penn. St. 291.

So if one who wishes to buy secretly employs a well-known agent of the owner to bid for him, and this deters others from bidding under the belief that such agent is bidding for the owner, and therefore that other bidders do not have a fair chance for purchasing the property, such would-be buyer cannot enforce a sale made to him through such agent, at a low valuation of the property : *Twining v. Morrice*, 2 Bro. C. C. 326.

So if two persons agree not to bid against each other, *for the purpose of stifling competition*, and buy the property at a low rate, for their common benefit, this contract is not only void between themselves (*Phippen v. Stickney*, 3 Met. 387; *Atcheson v. Mallon*, 43 N. Y. 148; *Gardiner v. Morse*, 25 Me. 140) but also avoids the sale as against the vendor, and he is not bound to convey : *Dudley v. Little*, 2 Ohio 504; *Loyd v. Malone*, 23 Ill. 43; *Wooton v. Hinkle*, 20 Mo. 290.

Therefore if A. gives B. his note to induce him not to bid against him at an auction sale, such note is void as against public policy and cannot be enforced by B. : *Jones v. Caswell*, 3 Johns. Cas. 29. For it is certain courts will not enforce any executory contract between the two who have thus combined to stifle competition at a public auction sale : *Doolin v. Ward*, 6 Johns. 194; *Wilbur v. How*, 8 Id. 444; *Thompson v. Davies*, 13 Id. 112; *Gardiner v. Morse*, 25 Me. 140; *Hook v. Turner*, 22 Mo. 333; *Atcheson v. Mallon*, 43 N. Y. 147; *Gulick v. Bailey*, 5 Halst. 87.

So if one bidder actually pays money to another to induce him

to withdraw his bid, and aid him in getting the property, this is illegal, and the party paying cannot recover back his money, although the receiver failed to carry out his part of the unlawful agreement: *Sharp v. Wright*, 35 Barb. 236.

In England the *sale itself* has been enforced, against the vendor, although the bidder paid another party not to bid: *Heffer v. Martyn*, 36 L. J. Ch. 372 (1867). But this seems contrary to our law.

It is otherwise as to a combination of persons, formed merely to enable them to buy, in the name of one, some large estate, to be divided between them, because too large for any one purchaser alone. This tends rather to enhance the price than reduce it, and the sale is not only valid, but the contract to divide may be enforced: *Smith v. Greenlee*, 2 Dev. 126 (1829); *Phippen v. Stickney*, 3 Met. 387; *In re Carew*, 26 Beav. 187; *Galton v. Emuss*, 8 Jur. 507; *Breslin v. Brown*, 24 Ohio St. 571; *McMinn v. Phipps*, 3 Sneed 196; *James v. Falerod*, 5 Tex. 512; *Kearney v. Taylor*, 15 How. 519; *Switzer v. Skiles*, 3 Gilm. 529.

It seems to be a necessary element of a fair auction sale, that the biddings should be open and public, so that parties interested may have equal means of knowing the true state of the bidding. The auctioneer, therefore, ought not to arrange secret signals with some parties by which they can make bids which others do not understand: *Conover v. Walling*, 15 N. J. Eq. 173.

In one case, with which the writer was conversant, a large sale of a valuable iron property in Pennsylvania took place, and a would-be purchaser agreed beforehand with the auctioneer to stand in a conspicuous position, and so long as the buyer continued to hold his right hand with the thumb in the armhole of his vest, the auctioneer should add \$100 to every bid made by other parties. By this means the property was struck off to him, much to the surprise of all other bidders; but the sale was set aside; for clearly an auctioneer has no right to bid, either for himself, or other parties, unless the fact is publicly known: *Church v. Marine Ins. Co.*, 1 Mason 341; *Barker v. Marine Ins. Co.*, 2 Mass. 369; *Brock v. Rice*, 27 Gratt. 812.

In another case sealed bids or offers were called for, and several parties sent in bids for a specific amount, but one party proposed to give "\$601 above the highest bid of the highest responsible bidder," but named no exact sum. This was held to be no valid

bid, since it gave such party an unfair advantage over other competitors: *Webster v. French*, 11 Ill. 254, where the subject is carefully considered.

RIGHTS AND REMEDIES OF PARTIES.—But supposing a sale has been fairly and legally made, so as to bind both parties, what are the rights and remedies of each.

In the first place, the auctioneer has no authority to rescind a sale, when once validly made, and take back the goods or release the purchaser from the contract. His duty and authority is “to sell,” not to unsell: *Nelson v. Aldridge*, 2 Stark. 384; *Boinev v. Leigner*, 2 Rich. (S. C.) 464.

And if the bidder refuses to take and pay for the goods, the auctioneer may immediately put them up again, resell and charge the first bidder with the loss: *Springer v. Berry*, 47 Me. 330; *Boinev v. Leignez*, 2 Rich. (S. C.) 464; *Furniss v. Sawers*, 3 U. C. Q. B. 77. Though the form of remedy would seem to be a special action of contract for the difference, and not a declaration for goods bargained and sold: *Lamond v. Daval*, 9 Q. B. 1030.

He is ordinarily bound, in the absence of usage or custom to the contrary, to sell for cash, and if he gives credit, or takes a time note of the buyer in payment, without authority, the owner may repudiate that part of the sale, and recover the price forthwith: *Ferrers v. Robins*, 2 C., M. & R. 152; 1 Gale 70; 5 Tyrwh. 705; *Williams v. Evans*, L. R., 1 Q. B. 352.

And if the terms of sale expressly require payment “in cash,” the auctioneer has no right to take the buyer’s check in payment; and if he does, the buyer cannot enforce the sale until actual payment of the check: *Broughton v. Silloway*, 114 Mass. 71; *Sykes v. Giles*, 5 M. & W. 645.

And if the auctioneer allows the buyer to take and carry away the goods, without paying for them, *contrary to the custom*, he is liable to the owner for the amount of the sale, whether the buyer would or would not be: *Brown v. Staton*, 2 Chitty 353.

As to the recovery of the price, the auctioneer, in case of a sale of *goods*, has such a special property or interest in the goods, that he can ordinarily sue and recover for the same in his own name, although known to be acting only as agent; and it seems to make no difference in this respect, whether the name of his principal is known or not: *Williams v. Millington*, 1 H. Bl. 81; *Hulse v.*

Young, 16 Johns. 1; *Thompson v. Kelly*, 101 Mass. 296; *Beller v. Block*, 19 Ark. 566; *Flanagan v. Crull*, 53 Ill. 352.

This right is more obvious, perhaps, where the auctioneer is unpaid, and has a lien on the price for his fees and disbursements; but it is not confined to such cases; for though he has been paid in full by the principal, he may still recover the price in his own name, unless the principal has done something to interfere with that right. The purchaser cannot object merely because the suit is brought by an agent: *Minturn v. Main*, 7 N. Y. 220. Though, of course, in such case the owner could sue and recover the whole price in his own name: *Girard v. Taggart*, 5 S. & R. 19.

This lien of the auctioneer for his unpaid fees and disbursements, is so strong, that if the buyer pays the whole price to the real owner, the auctioneer may still recover of him the amount of his unpaid fees, &c., in an action for the price: *Robinson v. Rutter*, 4 El. & Bl. 956; *Johnson v. Buck*, 35 N. J. L. 338.

If, however, the auctioneer has been fully paid, his right to recover the price in his own name is only *prima facie*; for, if the buyer and the real owner have made some agreement as to the mode of payment, or to offset a counter claim, proof of this would defeat an action by the auctioneer; for, if fully paid himself, he is suing only to enforce his principal's rights: *Grice v. Kenrick*, L. R., 5 Q. B. 340. So far as the cases of *Coppin v. Walker*, 7 Taunt. 237, and *Coppin v. Craig*, Id. 243, seem to lay down any different doctrine, they must be considered as somewhat modified. And see *Iseberg v. Bowden*, 8 Exch. 858.

If a bidder declines to give the name of the real buyer, he is personally liable to the auctioneer for the price: *McComb v. Wright*, 4 Johns. Ch. 659; *Nat. Fire Ins. Co. v. Loomis*, 11 Paige 431.

As to an auctioneer's right to sue for the price of *real estate* sold, it is quite different from that in sales of personal property. The auctioneer has no possession and apparent ownership of real estate, and the right to recover in his own name must depend on the terms and conditions of the sale. If the buyer has expressly agreed, or impliedly assented to pay the auctioneer in person, the action may be maintained, otherwise not: *Cherry v. Anderson*, 10 Ir. Rep. C. L. 204; *Evans v. Evans*, 3 Ad. & El. 132; *Fisher v. Marsh*, 6 B. & S. 411; *Thompson v. Kelly*, 101 Mass. 296.

For an auctioneer's right or interest in real estate he is selling,

or in fixtures attached thereto, is quite different from that in goods and chattels. He cannot maintain trespass in his own name for wrongfully removing such fixtures (*Davis v. Danks*, 3 Ex. 435) as he could for wrongfully removing personal property in his possession: *Tyler v. Freeman*, 3 Cush. 261.

And even if employed to sell goods on the premises of the owner, he has not, prior to such sale, such an interest or right in the premises as to prevent the owner from countermanding his authority and ordering him to depart, and from ejecting him, if he refuses to leave. *Taplin v. Florence*, 10 C. B. 744, in which the subject was much considered.

AUCTIONEER'S LIABILITIES.—An auctioneer is ordinarily personally responsible to the buyer to fulfil the sale; at least when he declines to give the name of his principal: *Mills v. Hunt*, 17 Wend. 333; 20 Id. 431; *Bush v. Cole*, 28 N. Y. 261; *Franklyn v. Lamond*, 4 C. B. 637; *Hanson v. Robedeau*, Peake 120; *Woolfe v. Horne*, 2 Q. B. Div. 355.

But the disclosure of the principal's name, and other circumstances, may show that the contract is solely between the buyer and the owner, and that the remedy of the former is solely against the principal: *Mainprice v. Westley*, 6 B. & S. 420; *Evans v. Evans*, 3 Ad. & E. 132.

If the auctioneer expressly warrants the title or quality of the goods, it would seem the buyer's remedy, if done without the principal's sanction, is against the auctioneer in person: *Dent v. McGrath*, 3 Bush 175; *Schell v. Stephens*, 50 Mo. 375; *Somers v. O'Donohue*, 9 U. C. C. P. 208.

For it is at least questionable whether an auctioneer has authority, *virtute officii*, to bind the owner by an express warranty, in the absence of some general usage or custom to that effect: *The Monte Allegre*, 9 Wheat. 647; *Upton v. Suffolk Mills*, 11 Cush. 589; *Blood v. French*, 9 Gray 198, 199.

The auctioneer is, of course, personally liable to his principal for want of ordinary care and skill in conducting the sale: *Maltby v. Christie*, 1 Esp. 340; *Kavanagh v. Cuthbert*, 9 Ir. R. C. L. 136; *Hibbert v. Bayley*, 2 F. & F. 48; *Cull v. Wakefield*, 6 U. C. Q. B. 178. And having collected the proceeds is liable to an action for money had and received, deducting his commissions, and counter claims: *Succession of Dowler*, 29 La. Ann. 437; *Harlow*

v. *Sparr*, 15 Mo. 184; and cannot set up title to the goods in himself as a defence to such action: *Osgood v. Nichols*, 5 Gray 420. And see *Hutchinson v. Gordon*, 2 Harr. (Del.) 179.

But if the principal had been guilty of such fraud that the purchaser could recover back the money from the auctioneer, the latter is not liable to the owner for the amount, after notice from the purchaser not to pay it over: *Stevens v. Legh*, 2 C. L. R. 251; 22 Law T. R. 84 (1853).

An auctioneer selling property not belonging to his principal, is liable to the real owner for a conversion, though acting innocently: *Hoffman v. Carow*, 20 Wend. 21; affirmed on error 22 Wend. 285; *Hills v. Snell*, 104 Mass. 177; *Davis v. Artingstall*, 29 Weekly Reporter 137; *Cochrane v. Rymill*, 40 Law T. R. 744; *Mercantile Bank v. Rymill*, 44 Id. 307; having of course a remedy over against his employer: *Adamson v. Jarvis*, 12 Moore 241; 4 Bing. 66.

And if the real owner should recover the goods from the purchaser, the latter might refuse to pay for them; or if he had paid, recover back the amount, as on a failure of consideration: *Dickenson v. Naule*, 1 N. & M. 721; 4 B. & Ad. 638.

EDMUND H. BENNETT.

Boston, 1883.

RECENT ENGLISH DECISIONS.

Court of Appeal.

EX PARTE REYNOLDS.

A witness is not the sole judge whether a question put to him may tend to criminate him. To entitle a witness to the privilege of silence the court must see, from the circumstances of the case and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer; but, if the fact of the witness being in danger be once made to appear, great latitude should be allowed him in judging for himself of the effect of any particular question.

LEDRU ROLLIN REYNOLDS was adjudicated a bankrupt on a petition filed in the London Bankruptcy Court on the 23d September 1881. On the 4th of December 1880, he had executed a post-nuptial settlement in favor of his wife and others, of which settlement his brother, George Kossuth Mazzini Reynolds, was one